***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

# 74-1604

ORIGINAL

# United States Court of Appeals

**For the Second Circuit**

B P/S

OGDEN DEVELOPMENT CORPORATION and
THE DWIGHT BUILDING COMPANY,

*Plaintiffs-Appellants,*

*against*

FEDERAL INSURANCE COMPANY,

*Defendant-Appellee.*

## APPELLEE'S BRIEF


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## APPELLEE'S BRIEF

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### Issue Presented for Review

Appellants seek review of a judgment of the District Court dismissing their complaint upon the ground that the Proposal Performance Bond (the Bond) sued upon constituted an unenforceable penalty.

Two statements in Appellants' statement of the issue are inaccurate. Appellants' assertion that the proposal of Charles Pankow, Inc. was incomplete (p. 3 of Appellants' brief) is wrong and is discussed in Point II below.

Appellants' characterization of the defenses other than that based on the Bond's being a penalty as "minor" (p. 4 of Appellants' brief) also is erroneous. It is Appellee's position, as noted below, that the judgment of the District Court can be sustained not only on the ground articulated by the Court but on other grounds as well.

## Statement of the Case

The facts are fully and fairly set forth in the opinion of the District Court (5a-17a).

In essence, in 1971, the University of Vermont (the University) sought design/build proposals from a preselected group of contracting firms, including Appellants and Charles Pankow, Inc. (Pankow), for a residential and educational complex known as the living/learning center. In order to obtain a copy of the University's Request for Design/Build Proposals (Exhibit 9), a large volume setting forth design criteria for the living/learning center, Pankow submitted to the University a Proposal Performance Bond (the Bond) in the amount of $20,000 executed by Pankow, as principal, and by Appellee Federal Insurance Company (Federal), as surety (96a). The Bond provided, in part, as follows:

> "Whereas the Principal [Pankow] has been prequalified as a Design/Build Team for Project 73 Living/Learning Center, Burlington, Vermont and upon the filing of the bond will be issued a copy of the request for Design/Build Proposals,
>
> "Now THEREFORE, if the said Principal shall notify the University in writing before July 2, 1971, that they

cannot prepare an adequate proposal or shall submit on or before 2 o'clock P.M., August 23, 1971, a complete Design/Build Proposal, then this obligation shall be void; otherwise the bond will be forfeited unto the University of Vermont as liquidated damages'' (29a-30a).

Under the terms of the Request, Pankow (and the other pre-qualified contracting firms) had until July 2, 1971, only one and a half weeks after receipt of the Request, in which to decide whether to submit a proposal (p. 2A-2 of Exhibit 9). Under the terms of the Request, the University was required to issue on July 6, 1971, formal notice to the competitors to commence work on their proposals which were due on September 6, 1973 (pp. 2A-2, 2A-3 of Exhibit 9). Thus Pankow (and the other bidders) had only nine weeks in which to prepare a proposal for a project budgeted at $5,730,000 (98a).

Pankow elected to submit a proposal (98a) and, on September 13, 1971, delivered its proposal to the University, the time for submission of proposals having been extended for one week (99a).

Pankow's proposal was complete and contained the drawings, model and written report required by Division 3 of the Request (59a; 99a). The proposal was accompanied by the ''letter of clarification'' (68a-70a) in which Pankow stated, in substance, that its proposal would cost $392,000.00 over the desired cost of $5,730,000 and that in order to reduce the cost to $5,730,000, certain specified reductions in the site work and other modifications acceptable to the University would have to be made (68a-70a).

By undated letter delivered on September 13, 1971 to Pankow's representative who had delivered the proposal to the University in Vermont, the University asked Pankow "* * * to either withdraw the Letter of Clarification, *or specify exactly which portions of the Proposal will be modified or removed to comply with the fixed price of $5,730,000*" (71a) (emphasis added). The University added that "* * * until either course is chosen by you and explained to us, in writing or by telegram with covering letter, we must consider your Proposal to be incomplete * * *" and gave Pankow until 9:00 A.M. on September 15, 1971, *less than 2 days,* to respond (101a).

By telegram sent to the Univerity on September 15, 1971 (73a-75a), Pankow complied with the University's directive and specified exactly which portions of its proposal would be modified or removed to comply with the fixed price of $5,730,000. Certain of the University's officials, however, unilaterally rejected Pankow's proposal and, in violation of the express terms of the Request, refused even to submit the proposal to the Evaluation Committee established under the terms of the Request.

The University assigned to the Appellants any and all of its rights under the Bond executed by Pankow and Federal. The appellants, as assignees, thereafter commenced this action on the Bond.

Several aspects of Appellants' brief require comment at this point:

(1) Appellants repeatedly and inaccurately refer to the Request as setting forth "specifications" for

the design and construction of the living/learning center (pp. 5, 8, 14, 16-17 of Appellants' brief). As discussed in Point II below, the Request did not establish rigid specifications to be met on pain of forfeiture of the Bond but rather set forth various design criteria "* * * to provide a guide for Design/Build Teams * * *" (p. 4C-1 of Exhibit 9) in their preparation of plans and specifications for the living/learning center. The criteria were "* * * suggested minimum standards * * *" (p. 4C-1 of Exhibit 9) to inform participants of the University's wishes and hopes for the living/learning center and to provide bases for comparing and evaluating the proposals received.

(2) Appellants' suggestions that Pankow's proposal was not submitted in good faith (pp. 21-22, 34 of Appellants' brief) are devoid of support. The facts surrounding the submission of Pankow's proposal and the accompanying "letter of clarification" and the subsequent modification of Pankow's proposal in response to the University's demand are detailed in the affidavit of R. J. Osterman (96a-102a). These facts in no way infer that Pankow was not acting in good faith and in no way were controverted by Appellants. The University's unilateral and, it is submitted, wrongfu' ejection of the proposal certainly does not call into question Pankow's good faith.

(3) Appellants react strangely to Federal's assertion below (109a-110a) that if the University regarded Pankow's proposal as complete for purposes of satisfying a requirement of the Department of Housing and Urban Development (DHUD) that there be at

least three proposals, elementary fairness requires that the University regard the proposal as complete for purposes of the Bond (pp. 18-19 of Appellants' brief). Appellants seem to concede that there was such a requirement of DHUD, which was financing, in part, the living/learning center project (pp. 18, 36 of Appellants' brief), but then turn facts on their heads by asserting that it was Pankow, which had no dealings with the government, and not the University which deceived DHUD.

**The Proceedings Below**

Appellants moved for summary judgment. interlocutory in character, on the issue of liability or, in the alternative for an order specifying which facts were without substantial controversy. Federal, in addition to pointing out issues of fact which precluded summary judgment for Appellants, cross-moved for summary judgment dismissing the complaint upon the other grounds (1) that the forfeiture of the amount of the Bond constituted an unenforceable penalty, (2) that, as a matter of law, Pankow's proposal was complete, or the University, Appellants' assignor, waived any deficiencies in the proposal, thus precluding recovery on the Bond, and (3) that, as a matter of law, breach by the University, Appellants' assignor, of its obligation to submit Pankow's proposal to the Evaluation Committee precluded recovery on the Bond.

The District Court held that there was no triable issue of fact with respect to one of the defenses raised by Federal, *i.e.*, that the Bond is a penalty rather than a legally

enforceable provision for liquidated damages, and that, as a matter of law, the defense is sufficient to defeat Appellants' claim (5a-17a). Thereafter judgment was entered dismissing the complaint (3a-4a).

**Federal's Position**

It is Federal's position that the judgment of the District Court was proper and can be sustained, as a matter of law, not only on the grounds articulated by the District Court but on the other grounds asserted by Federal as well.

## ARGUMENT

## POINT I

### The District Court properly held that the Bond under which appellants sue is a penalty rather than a legally enforceable provision for liquidated damages.

As held below, the parties to a contract certainly may agree at the time of the execution of the contract that a breach of the contract by the promisor will entitle the promisee to a specified or readily ascertainable amount of damages. *See, e.g., Mokar Properties Corp.* v. *Hall,* 6 App. Div. 2d 536, 539, 179 N.Y.S.2d 814, 819 (1st Dep't., 1958). However, the fact that the parties label an amount to be paid upon breach of a contract as "liquidated damages" is not conclusive. *See, e.g., J. Weinstein & Sons, Inc.* v. *City of New York,* 264 App. Div. 398, 400, 35 N.Y.S.2d 530, 532 (1st Dep't., 1942), *aff'd.,* 289 N.Y. 741, 46 N.E.2d 351 (1942); *Gitlin* v. *Schneider,* 42 Misc.2d 230, 238, 247 N.Y.S.2d 779, 788 (Sup. Ct., 1964). If the amount designated is dispropor-

tionate to the damage which could be anticipated to result from a breach of the contract, it will be held to be not "liquidated damages" but rather an invalid and unenforceable penalty. RESTATEMENT OF THE LAW OF CONTRACTS, §579. A provision for "liquidated damages" will be enforceable only if (1) actual harm would result from a breach of the contract and the extent of such harm is incapable or very difficult of accurate determination, and (2) the amount designated is a reasonable forecast of just compensation for the harm that would result from a breach. RESTATEMENT OF THE LAW OF CONTRACTS, §339. *See also, Big Top Stores, Inc.* v. *Ardsley Toy Shoppe, Ltd.*, 64 Misc.2d 894, 900, 315 N.Y.S. 2d 897, 904 (Sup. Ct., 1970), *aff'd.*, 36 A.D.2d 582, 318 N.Y.S. 2d 924 (2d Dep't., 1971).

In cases in which it is doubtful whether the sum fixed as "liquidated damages" is reasonable, the court should favor the construction which renders the fixed sum an unenforceable penalty. *Gitlin* v. *Schneider, supra,* 42 Misc.2d at 238, 247 N.Y.S.2d at 788; *J. Weinstein & Sons* v. *City of New York, supra,* 264 App. Div. at 400, 35 N.Y.S.2d at 532. Thus in *Gitlin* v. *Schneider,* the Court held as follows:

> "So strong is the policy in this state against penalties and forfeitures that the tendency of the courts even in doubtful cases 'is to favor the construction which makes the sum payable for breach of contract a penalty rather than liquidated damages, even where the parties have styled it liquidated damages rather than a penalty.' (City of New York v. Brooklyn & Manhattan Ferry Co., 238 N.Y. 52, 56, 143 N.E. 788, 790; see also Manhattan Syndicate, Inc. v. Ryan, 14 A.D. 2d 323, 327, 220 N.Y.S. 2d 337, 340-341.)"

Applying the above-quoted rules, it respectfully is submitted that in the instant case there can be no doubt that the provisions in the Request and in the Bond for forfeiture of $20,000 is a penalty and therefore unenforceable. There simply was no way that Pankow's—or anyone's—failure to submit a proposal could have inflicted damages upon the University in any amount, much less in an amount approaching $20,000.

The University already had incurred the cost of preparing the Request and clearly would bear this expense whether or not anyone opted to submit a proposal, whether or not anyone actually submitted a complete proposal, and whether or not anyone submitted a complete proposal which the University regarded as sufficiently attractive to accept. Thus in no way could the cost of the Request and the related costs of soliciting proposals be said to have resulted from Pankow's alleged failure to submit a complete proposal .

Appellants neither quarrel with the foregoing statement of the law nor contest that, if they stood in the University's shoes, the Bond would be a penalty. In fact, both below (57a) and in this Court (p. 9 of Appellants' brief), Appellants concede that "* * * it was obvious that the University could suffer only slight damage if a participant submitted an incomplete proposal." Appellants argue instead that they are entitled to recover in their own right because they have a direct contractual relationship with Pankow (Point I of Appellants' brief) or are third-party beneficiaries of the contract between Pankow and the University (Point II of Appellants' brief). Both arguments, it is respectfully submitted, are without merit.

The assertion that Appellants have a direct contractual relationship with Pankow flies in the face of reality. Pankow's contract was with the University and was to submit a complete proposal (or withdraw by a specified date) if given a copy of the Request. Furthermore, it is the Bond, ostensibly given to protect the University against loss due to Pankow's non-performance, which is sued upon, and the Bond, were it valid and enforceable, clearly is an undertaking by Pankow and Federal, as its surety, to the University and to no one else to pay damages upon breach of a specified condition, namely submission by Pankow of a "complete" proposal.

Appellants' reliance on the proposition that writings forming part of the same transaction and designed to effectuate a common purpose may be read together even though not between the same parties is inapposite for a myriad of reasons. The contracts and bonds between the participating contracting firms and the University were separate transactions related only in the sense that all concerned the proposed living/learning center. Furthermore, the proposition cited is a rule of construction to be invoked only to resolve ambiguous contractual language. *See, Hallmark Synthetics Corp.* v. *Sumitomo Shogi New York, Inc.*, 26 A.D.2d 481, 275 N.Y.S.2d 587 (1st Dep't., 1966), *aff'd.*, 20 N.Y.2d 871, 285 N.Y.S.2d 615, 232 N.E.2d 646 (1967). The contractual language at issue herein is perfectly clear. Finally, even if another document were helpful in resolving an ambiguity in Pankow's contract with the University, that in no way would establish a contract between Pankow or Federal and some third-party signatory to such other document.

Even if Appellants had a contract with Pankow and its surety, and clearly they did not, Appellants still could not prevail. The payment of $20,000 was not part of the performance to be rendered by Pankow to the University, to Appellants, or to anyone else; it clearly and unequivocally was labelled as "liquidated damages" in the event of Pankow's nonperformance. Appellants' expenditures were an investment made in hopes of obtaining a contract for construction of the living/learning center, and had nothing to do with Pankow's performance or nonperformance. Appellants' investment was lost simply because the University did not select their proposal and not because of anything Pankow did or did not do. Appellants in no way could have been damaged by Pankow's nonperformance and, therefore, the provision for "liquidated damages" is no less a penalty if Appellants are in their own shoes rather than those of the University.

The assertion that Appellants are third-party beneficiaries of Pankow's contract with the University also is without merit.

In order to recover as a third-party beneficiary under a contract, the beneficiary must show that performance of the promise was to be made directly to him and not to the promisee. *See, e.g., Tomaso, Feitner & Lane, Inc.* v. *Brown,* 4 N.Y.2d 391, 175 N.Y.S.2d 73, 151 N.E.2d 221 (1958); *United States Life Insurance Company in the City of New York* v. *Feuerstein,* 21 Misc.2d 853, 194 N.Y.S.2d 249 (Sup. Ct., 1959). In *Lait* v. *Leon,* 40 Misc.2d 60, 242 N.Y.S.2d 776 (Sup. Ct., 1963), the Court, relying upon *Seaver* v. *Ransom,* 224 N.Y. 233, 120 N.E. 639 (1918), specifically stated that the performance of the promise must run direct-

ly to the alleged third-party beneficiary. *See also, Harlan* v. *Hand,* 37 A.D.2d 291, 324 N.Y.S.2d 556 (1st Dep't., 1971), and cases cited therein; *KFC Corp.* v. *New York State Environmental Facilities Corporation,* 76 Misc.2d 170, 350 N.Y.S.2d 331 (Sup. Ct., 1973).

Moreover, the intention to confer a direct benefit upon a third party must appear clearly in order to enable the third party to recover on the contract. *Santora* v. *Greater New York Mutual Insurance Company,* 36 A.D.2d 929, 320 N.Y.S. 2d 928 (1st Dep't., 1971); *Snyder Plumbing & Heating Corp.* v. *Purcell,* 9 A.D.2d 505, 195 N.Y.S.2d 780 (1st Dep't., 1960). A merely incidental beneficiary cannot avail himself of a contract to which he is not a party. 2 WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (3rd Ed., 1968), §356A at page 839; *Associated Flour Haulers & Warehousemen, Inc.* v. *Hoffman,* 282 N.Y. 173, 180, 26 N.E.2d 7, 10 1940).

Pankow and Federal made no engagement to render any performance to Appellants or any other third persons. Pankow's performance, *i.e.,* the submittal of a proposal, was to be rendered solely to the University and the penalty imposed for nonperformance, the validity of which is challenged, was to be paid solely to the University. Thus Section 2A-2.03 of the Request provides that:

> "If for any reason a Design/Build Team fails to submit a complete proposal before this time * * *, the bond or cheque will be forfeited *to the University*" (p. 2A-2 of Exhibit 9). (Emphasis added)

Appellants are not third party beneficiaries of any promise of Pankow and Federal. The portion of Section 2A-2.03 relied upon by appellants in which *the University* (not

Pankow) undertook to distribute penalties among those Design/Build Teams who submitted unsuccessful proposals is at best an equitable assignment of whatever rights the University might have under the bonds. The "Tentative Draft No. 4" of the SECOND RESTATEMENT OF THE LAW OF CONTRACTS, relied upon by Appellants for the proposition that performance of a promise need not be rendered directly to the third party, simply does not represent the law in the State of New York.

Appellants can stand in no better position than the University and this, in effect, they concede by suing as assignees (19a-25a). The equitable assignment and the subsequent formal assignment of rights, if any, under the bond, simply do not detract from the fact that the forfeiture is a penalty and unenforceable. The judgment of the District Court should be affirmed.

## POINT II

### Pankow's proposal was complete and, as a matter of law, satisfied the condition of the Bond.

The relevant provisions of the Request (Exhibit 9), as well as the express terms of the Bond (29a-30a) establish that the Bond was conditioned upon the submission of a *complete* proposal, *i.e.*, a proposal which contained the documents prescribed in Division 3 of the Request, rather than a proposal which met all of the design criteria of Division 4 of the Request, which merely were suggested standards to be used in evaluating and comparing proposals. Thus Section 2A-1.01 required that "* * * proposals must include all documents specified in Division 3

* * *" (p. 2A-1 of Exhibit 9), rather than that proposals should meet all of the design criteria specified in Division 4. Similarly, Section 5B-1.01 provided that the first task of the Evaluation Committee was to determine with respect to each proposal whether the required documents had been submitted, and Section 5B-1.02 provided that the "* * * absence of any required documents may be cause for disqualification" (p. 5B-1 of Exhibit 9).

Sections 1B-1.02 and 4C-O-1.01 of the Request confirm that the various design criteria set forth in Division 4 were only suggested standards to be used in evaluating proposals rather than rigid requirements which had to be met. Thus Section 1B-1.02 provided that the population of the living/learning center was to be *approximately* 630 persons (p. 1B-1 of Exhibit 9) and Section 4C-O-1.01 provided that:

> "*The general objective of the Living/Learning Center Program* [Division 4 of the Request setting forth the various design criteria] as presented in this Request for Design/Build Proposals *is to provide a guide* for Design/Build Teams. All requirements listed are *suggested* minimum standards * * *" (p. 4C-1 of Exhibit 9). (Emphasis added)

Section 5A-3.01 of the Request (p. 5A-2 of Exhibit 9) which provided for judging proposals on a one-to-ten point scale for the various criteria also confirm that the design criteria were not rigid requirements but were only guides. If all proposals had to meet all criteria on pain of forfeiture, such a method of evaluation simply would have made no sense.

Appellants concede that Pankow delivered to the University the drawings, model, and written report required

under Division 3 of the Request (59a) which, it is submitted, constituted a complete proposal for purposes of the Bond. Appellants contend, however, that the "letter of clarification" accompanying Pankow's proposal rendered incomplete the otherwise complete proposal. Assuming but not conceding that the "letter of clarification" did introduce some deficiency in the form of Pankow's proposal (which, as noted, was all that the Bond concerned), it respectfully is submitted that the University waived any such deficiency.

Upon receipt of Pankow's proposal and "letter of clarification" on September 13, 1971, the University by letter asked Pankow "* * * to either withdraw the Letter of Clarification, *or* specify exactly which portions of the Proposal will be modified or removed to comply with the fixed price of $5,730,000 * * *" and added that "* * * until either course is chosen by you and explained to us, in writing or by telegram with covering letter, we must consider your Proposal to be incomplete * * *" (71a). By telegram sent to the University on September 15, 1971, Pankow complied with the University's demand and specified exactly which portions of its proposal would be modified or removed to comply with the fixed price of $5,730,000 (73a-75a). This offer by the University to accept the proposal upon specification of modifications to be made and Pankow's acceptance of said offer by specifying in detail the modifications contemplated, constituted a new contract between the parties which expressly or impliedly dispensed with any deficiencies in Pankow's submission of September 1?, 1971. RESTATEMENT OF THE LAW OF CONTRACTS §296; 5 WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (3rd

Ed., 1968), §680; *General Foods Corporation* v. *The Felipe Camarao,* 172 F.2d 131, 133 (2 Cir., 1949), *cert. denied,* 337 U.S. 908 (1949). As stated by Judge Swan in the *General Foods* case:

> "[T]he term 'waiver' is ambiguous; it is used to describe, among other situations, a contract for substituted performance. After a breach of the original contract, the parties may agree that one or both of them shall do something different from the performance which the original contract specified. In such a case the agreement is an accord, and when executed, is an accord and satisfaction."

That the University's letter of September 13, 1971 (71a-72a) and Pankow's telegram of September 15, 1971 (73a-75a) constituted such an accord and satisfaction, we respectfully submit, is not open to doubt and even Appellants nowhere contend that Pankow did not satisfy the accord by specifying the portions of its proposal to be modified or removed. Appellants, however, do attempt, after the fact, to avoid the effect of the accord and satisfaction by arguing (1) that there were no site plan, model and drawings reflecting the modifications (62a; p. 13 of Appellants' brief) and (2) that the proposal as modified would either house less students or require a greater concentration of students in each living center than called for in Division 4 of the Request (62a; p. 14 of Appellants' brief). Both arguments are without merit.

With respect to Appellants' argument that no revised site plans, model and drawings were submitted, the University's offer required Pankow to specify "* * * which *portions* of the Proposal *will be* modified or removed * * *"

(emphasis added) and did not require a full presentation of each and every modification. Furthermore, the University required a response in less than two days (71a; 101a). It was impossible to prepare and submit revised site plans, model and drawings in that period and the intention of the parties clearly was not to do so.

With respect to Appellants' argument that Pankow's proposal as modified would house fewer students or require a greater concentration of students than called for in Division 4 of the Request, even if this assertion were true, it would simply be irrelevant to the issues of whether Pankow's proposal was "complete" and whether Pankow breached the condition of its Bond. As noted above, the test of whether a proposal was complete concerned form only, *i.e.*, did the proposal include the documents required by Division 3 of the Request, and the University could waive any informality in a proposal (Section 2A-3.01 of the Request; 2A-2 of Exhibit 9). The various design criteria set forth in Division 4 of the Request including the suggested population and concentration of population were intended as suggested standards only by which to evaluate and compare proposals and not as rigid requirements which a proposal had to meet or be rendered "incomplete".

Appellants obviously misconceive Federal's position that any deficiencies in Pankow's proposal have been waived and attempt to limit the waiver to two documents, a network and schedule of progress payments, which the University, upon first examination, was unable to find in Pankow's proposal (72a; p. 35 of Appellants' brief). However, we submit, it is clear that the University offered to

and did waive any and all alleged deficiencies in Pankow's proposal resulting from the "letter of clarification" upon the latter's specification of the portions of the proposal to be modified which Pankow did by its telegram dated September 15, 1971 (73a-75a).

By reason of the foregoing, it respectfully is submitted (1) that, as a matter of law, Pankow's proposal was complete, thus satisfying the condition of the Bond or, in the alternative, any deficiencies in Pankow's proposal were waived, and (2) judgment dismissing the complaint should be affirmed.

## POINT III

**Breach by the University, plaintiffs' assignor, of its obligations under the terms of the request precludes recovery on the Proposal Performance Bond as a matter of law.**

Section 2A-3.01 of the Request provides, in part, as follows:

> "The University may consider informal any proposal not prepared and submitted in accordance with the provisions hereof, and may waive any informalities or reject any or all proposals. If *in the majority opinion of the Evaluation Committee,* any Design/Build Proposal is incomplete, that Design/Build Proposal will be considered as having not been submitted" (p. 2A-2 of Exhibit 9). (Emphasis added)

Furthermore, Section 5B-1.01 of the Request provides that "* * * members of the Evaluation Committee will first examine each Design/Build Proposal to determine whether

the following Design/Build Proposal documents have been provided (See Division 3) * * *'' (p. 5B-1 of Exhibit 9) and Section 5B-1.02 of the Request provides that ''* * * the absence of any required document may be cause for disqualification'' (p. 5B-1 of Exhibit 9).

It respectfully is submitted that the above-quoted provisions of the Request leave no doubt that a determination by a majority of the Evaluation Committee that Pankow's proposal was incomplete and that such informality should not be waived was a condition precedent to any right of recovery on the Bond. Appellants concede that Pankow's proposal was not even submitted to the Evaluation Committee (61a; 63a). Having thus failed to submit the proposal to the Evaluation Committee, the University and Appellants, its assignees, are barred from recovery on the Bond.

Appellants seek to avoid the significance of the University's failure to submit the proposal to the Evaluation Committee by disingenuously arguing that the failure was excusable because Pankow's proposal was too incomplete to evaluate (pp. 34-35 of Appellants' brief). This argument simply ignores the fact that under the terms of the Request, it was the Evaluation Committee which was required to determine whether the proposal was complete. Thus under Sections 2A-3.01, 5B-1.01, 5B-1.02 and the balance of Division 5 of the Request (pp. 2A-2, 5B-1 *et seq.* of Exhibit 9) the Evaluation Committee had two distinct functions: (1) to determine whether proposals were complete for purposes of proposal performance bonds, and (2) to evaluate the relative merits of the complete proposals.

The University deprived Pankow of a substantial right in refusing to submit Pankow's proposal to the Evaluation Committee which could waive informalities if it deemed a proposal worthy of consideration, and which had the safeguard of majority rule against capricious decisions. The University, through its assignees, seeks to hold Pankow to a strict standard of compliance with the terms of the Request at pain of forfeiture of $20,000. In fairness, the University must be held to a standard no less strict. The University concededly having violated its obligations, it is submitted that recovery herein must be denied.

## POINT IV

**Apart from the defenses raised by Federal, issues of fact preclude summary judgment for appellants.**

As set forth in Federal's statement pursuant to Rule 9(g) of the District Court (90a-92a) and the affidavit of R. J. Osterman (96a-112a), there are significant issues of fact which preclude summary judgment for Appellants even if the judgment dismissing the complaint is not affirmed.

## Conclusion

**The judgment of the District Court should be affirmed.**

Respectfully submitted,

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Service of 2 copies of the
within Brief is hereby
admitted this 5th day of
Aug 1974

Signed Rogers & Wells by AK

Attorney for Plaintiffs-Appellants